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No. 91-1974

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEATHERLITE PRECAST CORPORATION,
PETITIONER

v.

JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, and JIMMIE LOU FISHER LUMPKIN, Treasurer of the STATE OF ARKANSAS
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

SUPPLEMENTAL BRIEF FOR THE PETITIONER

EUGENE G. SAYRE
JACK, LYON & JONES, P.A.
425 West Capitol Avenue
3400 TCBY Tower
Little Rock, AR 72201-3472
(501) 375-1122
Counsel of Record for Petitioner

PARAGON PRINTING & STATIONERY COMPANY, INC.

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The Petitioner files this Supplemental Brief, pursuant to the provisions of Rule 15.7 of the Supreme Court Rules, to bring to the attention of the members of this Court the very recent decision of the Supreme Court of Connecticut in the case of *Morton Buildings, Inc. v. Bannon*, 222 Conn. 49, 607 A.2d 424 (Conn., May 12, 1992). This decision was not discovered by Petitioner's counsel until after the Reply Brief for Petitioners was filed herein on July 23, 1992.

ADDITIONAL STATE SUPREME COURT DECISION IN CONFLICT WITH THE DECISION OF THE ARKANSAS SUPREME COURT IN THE INSTANT CASE

The very recent decision by the Connecticut Supreme Court in *Morton Buildings, Inc. v. Bannon, supra*, involves the issue of the proper treatment (for Connecticut Use Tax purposes) to be given the costs associated with the acquisition and erection of prefabricated "made-to-order" metal buildings by an out-of-state based contractor/prefabricator. The resulting tax effect of this decision by the Connecticut Supreme Court in its *Morton Buildings* case is in direct conflict with the tax result flowing from the Arkansas Supreme Court decision in this *Featherlite* case, [1] as these decisions would be applied to similarly situated contractors.

In fact, the decision by the Connecticut Supreme Court in this *Morton Buildings* case holds that the out-of-state located contractor/prefabricator is *not* subject to *any* Connecticut Use Tax upon the erection of these prefabricated metal buildings in the State of Connecticut, under the terms of its contracts with the in-state purchasers. Thus, the out-of-state located contractor-prefabricator in this *Morton Buildings* case actually has been placed at a competitive pricing advantage over the local Connecticut contractors who construct the same type of metal buildings utilizing traditional "on-site" construction methods.

Though Featherlite submits that the taxing effect that results from this decision by the Connecticut Supreme Court is in direct conflict with the effect of the decision of the Arkansas Supreme Court in this *Featherlite* case, this recent decision by the Connecticut Supreme Court in the *Morton Buildings* case reached exactly the same conclusion that has been reached by either the administrative hearing tribunals, trial courts, or intermediate

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[1] *Pledger v. Featherlite Precast Corporation*, 308 Ark. 124, 823 S.W.2d 852 (Ark., 1992).

appellate courts in four other states where this same Use Tax question was raised by Morton Buildings, Inc. [2]

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[2] Morton Buildings, Inc. of Morton, Illinois, has been successful in securing favorable administrative or judicial determinations from the States of Minnesota, Missouri, New York and Wisconsin, to the effect that the company's activities in constructing "made-to-order" metal buildings on sites in those states do *not* cause the company (i.e. a contractor/prefabricator) to incur *any* state Use Taxes on the value of either the raw materials or the finished components of such metal buildings. See, *Morton Buildings, Inc. v. Commissioner of Revenues*, Minnesota Tax Court, Docket No. 5385 (November 22, 1991), *pending on appeal, Morton Buildings, Inc. v. Commissioner of Revenues*, Minnesota Supreme Court, Docket No. C7-92-82 (Minnesota) (submitted on brief, March,1992); *Morton Buildings, Inc. v. Director of Revenues*, Missouri Administrative Hearings Commission, Docket No. 88-001879RZ (December 8, 1989); *Morton Buildings, Inc. v. Chu*, 126 A.D.2d 828 510 N.Y.S.2d 320 (3rd Dist., 1987), *affirmed*, 70 N.Y.2d 725, 719 N.Y.S.2d 643, 513 N.E.2d 1304 (N.Y. Ct. App., 1987); and *Wisconsin Dept. of Revenue v. Morton Buildings, Inc.*, Dane County Wisconsin Circuit Court, Docket No. 91-CV-3124 (February 10, 1992) (no appeal). Because of these decisions, the States of Minnesota and Connecticut have recently amended their respective Use Tax statutes to legislatively impose their Use Taxes upon the value of the raw materials used in these types of metal buildings when they are erected on the job sites by the out-of-state contractor/prefabricator. These legislative amendments put the out-of-state contractor/prefabricator on the same competitive tax plane, for Use Tax purposes, as the in-state "on-site" contractor is for Sales Tax purposes, when the "on-site" contractor uses the more traditional methods of constructing such metal buildings.

The only decision imposing state Use Taxes on Morton Building, Inc.'s activities of in-state "on-site" erection of the out-of-state prefabricated metal buildings was the administrative decision by the Texas Comptroller of Public Accounts in the matter styled *In Re Morton Buildings, Inc.*, Order of the Comptroller Public Accounts, State of Texas, Hearing No. 26,653 (July 26, 1991). This dispute is now pending on the corporate taxpayer's appeal, as *Morton Buildings, Inc. v. Sharp, et. al.*, Travis County Texas District Court No. 91-13867. However, it must be noted that in this pending Texas proceeding, the State of Texas is attempting to impose Texas' Use Tax *only* upon the value of the raw materials used in the metal buildings, *not* upon the value of the entire structure (i.e. the value including the raw materials, plus the cost of direct construction labor, overhead and profit), as the Arkansas DF&A's "administrative practice" did in this *Featherlite* case.

Featherlite Precast Corporation submits that the question of the proper (i.e. constitutional) method of imposing state Use Taxes upon the activities of contractor/prefabricators (whether involved in the construction of precast concrete structures, prefabricated metal buildings, or other similar structures) is an important issue that is currently pending in a number of taxing jurisdictions. The two questions presented by Featherlite's Petition for Certiorari have never been passed upon directly by a decision of this Court and the Petitioner has shown that the states do not have a uniform method of applying their respective Use Taxes in this type of factual situation. [3] However, the vast majority of these states do utilize the reporting method adopted by Featherlite in this case.

The compliance practice adopted by Morton Buildings, Inc. of either paying Sales Tax or Use Tax to the state in which the company operates its prefabricating plants (based upon the value of the raw materials purchased to make the components for the special order metal buildings), is a practice that is in accord with the rationale of the decision of the Alabama Supreme Court in the case of *Alabama Precast Products, Inc. v. Boswell*, 357 So.2d 985 (Ala., 1978). However, Featherlite feels constrained to again emphasize that the decision of the courts in all of these *Morton Buildings* controversies, and the decisions in all of the cases cited in Featherlite's Petition for Certiorari, involved situations where the states were either attempting to, or were allowed to, impose their excise taxes *only* upon the value of the raw materials purchased by the contractor/prefabricator to be incorporated into the erected structures. As the Louisiana Supreme Court decided in the case of *Chicago Bridge & Iron v. Cocreham*, 317 So.2d 605 (La., 1975), the applicable state Sales Taxes or Use Taxes are to be imposed *only* upon a tax base composed of the value of the raw materials utilized by the contractor/prefabricator in the production of the components of the structure that the contractor/prefabricator is obligated to erect on the various job sites. There are no reported

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[3] See the compilation or summary of Use Tax treatment of contractor/ precasters that is set forth in Appendix F of the Reply Brief for the Petitioner.

decisions by any appellate or trial court reviewed by the Petitioner's counsel that imposed a state Sales Tax or Use Tax upon the total value of the completed components (as did the Arkansas Supreme Court in this *Featherlite* decision), so as to put contractor/precasters (i.e. those who utilized the precast/prefabricated methods of construction) at a considerable competitive pricing disadvantage with those similarly situated contractors who utilized the more traditional methods of construction. [4]

The Petitioner submits that the very recent decision by the Connecticut Supreme Court in the *Morton Buildings, Inc.* case, *supra*, represents another decision by the highest appellate court of one of Arkansas' sister states that is in direct conflict with the decision rendered by the Arkansas Supreme Court in this *Featherlite* case. Petitioner further reiterates that there are no reported decisions by any other state supreme courts that have adopted or support the rationale of the Arkansas Supreme Court in this *Featherlite* case.

This Court's granting of the Petition for Certiorari filed in this case by Featherlite would give the members of this Court an opportunity to render a decision that will give much needed guidance to both contractor/prefabricators and the taxing authorities of the various states that impose Sales and Use Taxes upon the construction of buildings or structures where the newer methods of precasting or prefabricating the components of these structures are

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[4] See specifically, the decisions of the Court of Common Pleas of Spartanbarg County, South Carolina, in the cases of *Tindall Concrete Products, Inc. v. South Carolina Tax Commission*, Docket No. 84–CP–42–13 (April 24, 1985) and *Metromont Materials Corp. v. South Carolina Tax Commission*, Docket No. 84–CP–42–14 (April 24, 1985), for judicial decisions that upheld the Use Tax reporting method for contractor/precasters that was adopted by Featherlite in this controversy. These South Carolina decisions specifically rejected an "administrative practice" adopted by the South Carolina Tax Commission for imposing these excise taxes that was the same as the "administrative practice" adopted by the Arkansas DF&A in this case, which "administrative practice" has been sustained by the Arkansas Supreme Court's decision in this *Featherlite* case.

being utilized by contractors who are actually obligated by contract to erect the structures on the job sites.

CONCLUSION

For these further reasons, the Petitioner submits that its Petition for a Writ of Certiorari to the Arkansas Supreme Court should be granted.

Respectfully submitted,

AUGUST 7, 1992

EUGENE G. SAYRE
JACK, LYON & JONES, P.A.
425 West Capitol Ave.
3400 TCBY Tower
Little Rock, AR 72201
(501) 375-1122
Counsel of Record
For Petitioner